

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARCUS R. KING, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0935

Case Type: PA

DECISION NO. 41545

Appearances:

Elizabeth M. Pierson, Attorney, Pines Bach LLP, 2 East Mifflin Street, Suite 600, Madison, Wisconsin, appearing on behalf of Marcus R. King.

David G. Makovec, Attorney, Department of Administration, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Corrections.

DECISION AND ORDER

On May 20, 2025, Marcus King filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the State of Wisconsin Department of Corrections (DOC). The matter was assigned to Commission Examiner Anfin J. Wise.

A Zoom hearing was held on August 5 and 7, 2026, by Examiner Wise. The parties made oral argument at the conclusion of the hearing. On August 18, 2026, Examiner Wise issued a Proposed Decision and Order affirming the discharge. On August 24, 2026, King filed objections to the Proposed Decision and Order and on August 30, 2026, DOC filed a response.

Being fully advised on the premises and having considered the matter, the Commission makes and issues the following:

FINDINGS OF FACT

1. Marcus R. King (King) was employed by the State of Wisconsin Department of Corrections (DOC) as a Supervising Officer 1 (Lieutenant) at Green Bay Correctional Institution (GBCI), and he had permanent status in class at the time of his discharge.

2. The DOC is a state agency responsible for the operation of various corrections facilities including GBCI, a maximum-security facility located in Green Bay, Wisconsin.

3. On November 13, 2025, King escorted three inmates during the 9:30 PM institution count from the Restrictive Housing Unit to General Population.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following:

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction over this appeal pursuant to Wis. Stat. § 230.44 (1)(c).

2. The State of Wisconsin Department of Corrections had just cause within the meaning of Wis. Stat. § 230.34(1)(a) to discharge Marcus King.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following:

ORDER

The discharge of Marcus King by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 11th day of September 2026.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Electronically signed by Peter G. Davis

Peter G. Davis, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Section 230.34(1)(a), Stats., states in pertinent part:

An employee with permanent status in class ... may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

Section 230.44(1)(c), Stats., provides that a State employee with permanent status in class:

may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission ... if the appeal alleges that the decision was not based on just cause.

Marcus King had permanent status in class at the time of his discharge and his appeal alleges that the discharge was not based on just cause.

The State has the burden of proof to establish that King was guilty of the alleged misconduct and whether the misconduct constitutes just cause for the discipline imposed. *Reinke v. Personnel Bd.*, 53 Wis.2d 123 (1971); *Safransky v. Personnel Bd.*, 62 Wis.2d 464 (1974).

The record establishes the obvious reality that an accurate count of inmates housed at a correctional facility is critically important. Thus, there are well established protocols advising employees when count is about to begin, when count is underway, and when count is over. To maximize the accuracy of count, it is DOC policy that there should be no inmate movement during count except for medical or security emergencies.

The record also establishes that, in reality, some inmate movement does occur during count for non-emergent security purposes such as drug testing, cell searches and selective inmate interviews.

On November 13, 2025, during the 9:30 PM institution count, King was escorting three inmates from the Restrictive Housing Unit (RHU) to General Population (GP). As they approached a security gate, a correctional officer notified King that because count was ongoing, he would not be opening the gate to allow further movement of inmates. Despite that, King directed the officer to open the gate so that he (King) could continue moving the inmates to GP. The officer again refused. King then contacted a supervisor who ordered the officer to open the gate. The officer then did so and King proceeded.

King asserts he was unaware count was underway when he began moving the inmates. Given the regularity of how count is scheduled and announced, this assertion seems highly unlikely. Further, even if true, the reason King asserts for inmate movement does not withstand scrutiny. The understandable interest in getting inmates back to their regular housing so they could shower after completing cleaning duties does not fit any of the exceptions for inmate movement during count.

Given all of the forgoing, the Commission concludes that King did engage in misconduct by moving the inmates during count.

Turning to the issue of whether King's misconduct warranted discharge under the just cause standard, earlier in 2026 the Commission affirmed a five day suspension King received for multiple work rule violations. Under the standard DOC disciplinary progression that the Commission has found to be consistent with just cause, discharge is the next level of discipline for those with a recent five-day suspension on their record. Therefore, there is just cause for King's discharge unless he can establish a valid basis for concluding otherwise. King primarily contends he has done so by establishing that two other employees engaged in the same misconduct but were not disciplined by DOC.¹

The Commission has held that if proven by the appellant, disparate disciplinary treatment for the same misconduct by similarly situated employees can be a basis for modifying or rejecting discipline. See *Morris v DOC*, Dec. No. 35682-A (WERC, 7/15). King points to alleged improper inmate movement during count by two other employees as examples of disparate treatment.

As to employee D, DOC asserts that the inmate movement during count was part of an unscheduled after hours medical emergency that was consistent with DOC policy. King claims otherwise-arguing in part that it can't be an emergency because no ambulance was called. King also points to an email he sent expressing his concern about the inmate movement he observed. To meet his burden, King needed to prove that employee D was not moving an inmate for an after-hours medical emergency and/or that his definition of an emergency is supported by other credible evidence. He did not do so and thus he has not established that the absence of discipline for employee D was disparate treatment.

As to employee F, DOC contends that the inmate movement occurred after count was completed. King has the burden of persuasively rebutting that contention and has not done so.

Given the absence of a substantiated disparate treatment defense, King's misconduct in the context of the existing five-day suspension provided DOC with just cause to discharge him. Therefore, the discharge is affirmed.

¹ In addition to his disparate treatment argument, King asserts that there is no evidence of any actual harm occurring due to his misconduct. DOC counters that it is the risk of harm that matters and that employees need to be held accountable for policy violations. DOC has the better of this argument. While King points to *Simonsen v. DOC*, Dec. No. 40957 (WERC, 10/25) as a Commission decision where "no harm" was a cited basis for reducing the level of a suspension, there are other Commission decisions that reject the "no harm" defense. Indeed, in its March 2026 decision upholding King's five day suspension, the Commission rejected the "no harm" defense. Further, the conduct of the employee in *Simonsen* was negligent while King intentionally chose to violate policy.

King also points to his interest in continuing his DOC career and cites positive evaluations he has received. If King were a long-tenured DOC employee with a sterling record, some potential for grace in the form of reinstatement without back pay might be warranted. But he is not long tenured and had a five-day suspension on his record at the time of discharge.

Issued at Madison, Wisconsin, this 11th day of September 2026.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Electronically signed by Peter G. Davis

Peter G. Davis, Chairman